ELMER SILVERA ET AL.

IBLA 79-349 Decided July 25, 1979

Appeal from decision of California State Office, dismissing protest against bond approval (CA MC 9039).

Affirmed.

1. Act of December 29, 1916 -- Mineral Lands: Mineral Reservation -- Mining Claims: Surface Uses -- Rules of Practice: Protests -- Stock-Raising Homesteads

   A bond filed by a mining claim owner, covering lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. §§ 291-301 (1970), need only be set in an amount to cover damages to crops, improvements, and the value of the land for grazing purposes within the limits of the mining claim. The ad damnum of the bond does not have to be sufficient to cover damages caused by a disruption of the surface owner's entire grazing operation.

2. Act of December 29, 1916 -- Mineral Lands: Mineral Reservation -- Mining Claims: Surface Uses -- Rules of Practice: Hearings

   Where surface owners object to the amount of a bond, submitted to the Bureau of Land Management under sec. 9 of the Stock-Raising Homestead Act of Dec. 29, 1916, as amended, 43 U.S.C. § 299 (1970), as being inadequate in amount, request a hearing thereon, but fail to tender any evidence which would impel the conclusion that a hearing is likely to be productive and meaningful, the request for a hearing is properly denied.

3. Act of December 29, 1916 -- Mining Claims: Surface Uses -- Rules of Practice: Private Contests

The owner of a patented stockraising homestead, in which the minerals have been reserved to the United States under the Act of Dec. 29, 1916, as amended, has a sufficient adverse interest under 43 CFR 4.450-1, to initiate a contest against a mining claimant, alleging lack of discovery of valuable minerals.

The issue of whether a mining claim has been perfected by discovery of available mineral has no place in a proceeding to determine whether the amount of a stockraising homestead bond is sufficient.

APPEARANCES: Martin B. Brifman, Esq., Cooper, Stockman, Martorana & Brifman, Sacramento, California, for appellants; Howard J. Coleston, Esq., Berkeley, California, for the mining claimants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Elmer Silvera, Imogene Silvera, Clarence Silvera, and Anne Silvera (hereinafter "surface owners") have appealed from a decision dated March 13, 1979, rendered by the California State Office, Bureau of Land Management (BLM), dismissing their protest filed against the BLM approval of a cash bond in the amount of $1,000, filed by Louise Shultis, individually, and as agent for the co-locators, George MacArthur Posey, George MacArthur Posey III, Robert Lee Posey, Susan L. Sanchez, Tony Scalcucci, Terry Hawkes, and Esthur Nippress (hereinafter "mining claimants" or "mining locators"). The bond was filed pursuant to section 9 of the Act of December 29, 1916, as amended, 43 U.S.C. § 299 (1976), for the Posey-Shultis Association placer claim, located on lands patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-300 (1970), and presently owned by the surface owners.

On November 6, 1978, Silvio E. Borello, Esq., San Jose, California, then counsel for appellants, filed objections to the amount of the bond as follows:

This objection is based on the following (but not limited to) factors:
1. The amount of the bond is insufficient in light of the great and lasting damages that will be done to objecting

parties' property. The grazing rights alone are valued in excess of $10,000 per year. The bond does not contemplate damage to these grazing rights which will be incurred in future years.

2. The activity will polute [sic] Maxwell Creek which flows on a lower portion of the objecting parties property. This water is used to sustain the cattle on the property and such damage will render objecting parties enjoyment and use of their property useless, all to their damage in the sum of $10,000.00 per year.

3. Said Maxwell Creek flows into Lake McClure which is a body of water used for recreation by the public and also for domestic purposes by the Merced Irrigation District. Objecting parties allege and believe that the conduct contemplated will expose objecting parties to possible law suits from the Merced Irrigation District on account of this conduct. That the exposure of objecting parties to the Merced Irrigation District for damages is in the reasonable sum of $55,000.00.

4. Objecting parties have developed the property for the use as a cattle ranch. Improvements in the nature of springs, fences, gates, and roads have been made by objecting parties. These improvements will be destroyed or rendered unless [sic] by the activities contemplated and the reasonable value of said improvements is the sum of $15,000.00.

The objecting parties herein request that the bond be rejected and a hearing set to determine all matters concerned herein.

The decision appealed from recited in part as follows:

In view of the protest an examination of the land was made by a Bureau mining engineer and a range conservationist. According to their report, Maxwell Creek, an intermittent stream, crosses the northerly part of the claim approximately 4,000 feet from the point where it empties into Lake McClure. The lands within the limits of the claim contain a dense to moderate cover of chamise with scattered occurances of pine and some oak and did not reveal the existense of crops or improvements. The land appears to have been moderately grazed by livestock in the past. The soils on the land consist of two series which were evaluated for an estimated total potential annual production of air dry forage. The conclusion was reached that there are approximately 110 forage covered acres

within the subject claim with annual usable forage production marketable at $340.00.

Appellants assert in their appeal that the $1,000 bond is inadequate as follows:

> The grazing rights alone of the land in question are valued in excess of 10,000.00 per year. Further, any damage to the grazing rights would necessarily have a harmful effect upon the cattle which graze in close proximity to Maxwell Creek. The alleged point of discovery abuts this creek and danger to the cattle in this area from excavation and other mining operations is clearly foreseeable. It is submitted that danger to the grazing cattle in the location area has not been taken into account in evaluating the sufficiency of the $1,000.00 bond. There is little doubt that the initiation of mining operations in this area would seriously interrupt the grazing activities of the surface owners which have been carried on for so many years. The Placer Claimants seek authorization to conduct mining operations over in excess of 150 acres of the grazing land owned by the surface owners. It is difficult to understand how a bond of only $1,000.00 can be deemed sufficient to indemnify the surface owners for damages which are virtually certain to occur to the value of these grazing rights and the real property itself.
>
> The probability of pollution of Maxwell Creek and the effect upon the grazing of cattle there does not appear to have been given the serious consideration it deserves by the California Bureau of Land Management. Again, the land has been used for grazing for many years and such activity should be given every preference in determining the amount of the bond adequate to protect its use. Pollution of this natural waterway by conduction of mining operations would seriously impair the value of the land to the surface owners who depend upon this source to water their cattle. The introduction of pollutants of any kind would cause immediate harm to the cattle as well as to the fair market value of this real property. The land was set aside by the United States Government for grazing, and as homestead entrymen, the surface owners herein are entitled to preservation of its value as such.

Appellants further assert that the mining claim has not been perfected by a discovery of a valuable mineral and they request a hearing "in order to determine the potential damage which may occur to the surface of the land" as a consequence of mining operations.

[1] Where a mineral locator (or mining claim owner) seeks to carry on mining operations on a claim located within a patented stock-raising homestead entry, he must post a bond (if he elects to file a bond in lieu of the other two courses of action spelled out in 43 U.S.C. § 299 (1976)), sufficient in amount to cover only damage to crops, improvements, and the value of the land for grazing purposes. The bond need not be sufficient to cover damages outside the limits of the mining claim or to cover damages caused by a disruption of the surface owner's entire grazing operation. L. W. Hansen, A-31029 (December 30, 1968). The report, embodying the results of the field examination of December 7, 1978, categorically states that the examination "did not reveal the existance [sic] of crops or improvements within the limits of the claim." The pictures accompanying the report confirm this conclusion. A report of an inspection of the land, which was made on January 9, 1979, by a BLM Range Conservationist reached the following conclusions:

> There are approximately 110 forage covered acres within the subject land. Total potential annual production of air-dry forage is 476,000 lbs./yr. Realizing that livestock can only utilize 80 percent of this yearly production, the total usable forage is approximately 380,800 lbs./yr.
>
> An animal unit requires 800 lbs. of air-dry forage per month. Therefore: 380,800 lbs./year / 9600 lbs/yr/AUM = 40 AUM's.
>
> As shown by the July 1977 issue of Farm Real Estate Market Development CD-80, ERS, USDA, the commercial rate for California is $8.50 per AUM for 1977. At this rate the marketable forage produced per year on the subject land comes to a total of $340.

The Range Conservationist also noted that "[n]o range improvements were located on the subject land." This tends to buttress BLM's conclusion that the land in the mining claim was devoid of improvements. The bare assertions to the contrary made by appellants, unsupported by any probative evidence, are deemed insufficient to overcome the evidence submitted by the mining claimants and which is substantiated by BLM. Cf. A. J. Maurer, Jr., 15 IBLA 151, 81 I.D. 139 (1974). That mining operations may result in damage to appellants' grazing operations beyond the confines of the mining claim is no predicate for an increased ad damnum of the bond. L. W. Hansen, supra. The amount of the bond does not, of course, limit the liability of the mining claimants to the surface owners. See Bourdieu v. Seabord Oil Corp. of Delaware, 38 Cal. App. 2d 11, 100 P.2d 528 (1940); cf. Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798 (1955). Appellants' claim that "grazing rights alone of the land are valued in excess of $10,000.00 per year" is a bare assertion controverted clearly by the record. We find that appellants have not demonstrated that the amount of the bond in the sum of $1,000 is inadequate.

[2] Although appellants have requested a hearing, they have submitted no evidence which would impel the conclusion that a hearing is likely to be productive and meaningful. Since there is no right to a hearing on the issue of the proper amount of a stockraising homestead bond and since it is not clear that a hearing will serve any useful purpose, the request for a hearing is denied.

[3] Appellants in their Statements of Reasons state that "no showing by the Placer Claimants has been made that any minerals actually exist in the areas claimed." The issue of whether a mining claim has been perfected by a discovery of a valuable mineral has no place in a proceeding to determine whether the amount of a stock-raising homestead bond is sufficient.

The proper procedure for a surface owner of land, patented under the Stock-Raising Homestead Act of December 29, 1916, as amended, 43 U.S.C. §§ 291-300 (1970), to challenge the validity of a mining claim for lack of a discovery of a valuable mineral is by the initiation of private contest pursuant to 43 CFR 4.450. In Thomas v. Morton, 408 F. Supp. 1361 (D.C. Ariz. 1976), aff'd sub nom. Thomas v. Andrus, 552 F.2d 871 (9th Cir. 1977), the district court addressed itself to the question, saying:

> The Department of Interior, Board of Land Appeals, has recently dealt with the specific question involved here, i. e., whether a stock-raising homestead patentee may initiate a contest against mining claims pursuant to 43 C.F.R. 4.450-1. Sedgwick v. Callahan, 9 IBLA (January 31, 1973). At page 222, the Board stated:
>
> > The most compelling argument in support of the position that the surface owner under the Act has standing to bring a contest against a mining claimant can be made from the language of the Act itself. As set forth above, the Act makes a distinction between the mineral prospector and the claimant who has actually made a discovery of minerals. With respect to the mere prospector, the surface owner is stated to have the right to compensation for damages to the surface resources caused by prospecting activities. On the other hand, the claimant who has actually acquired title to a mineral deposit from the United States, either by patent or a showing that he has perfected a discovery of a valuable mineral deposit as contemplated by the general mining laws, Mohamed, supra [decision of the Director, BLM, dated October 7, 1957, captioned Earl G. Davis v. Edith Mohamed, Arizona Contest 10000], may reenter and conduct mining activities only upon:

1. Securing the written consent of the surface owner; or

2. Agreement as to the amount of damages to the surface; or

3. Execution of a sufficient bond for the benefit of the surface owner to secure payment of such damages.

Since the Department of the Interior is the proper tribunal to determine whether a valid discovery has been perfected in an unpatented mining claim, Best v. Humboldt Placer Mining Co., 371 U.S. 334 [83 S.Ct. 379, 9 L.Ed.2d 350] (1963), the surface owner is entitled to bring an action in the Department for that purpose, so that he may know the proper course to follow in protecting his surface estate. Branch v. Brittan, et al., 50 L.D. 510 (1924).

Accordingly, it is concluded that the contestants have standing to bring these contests to determine whether valid discoveries have been perfected on the mining claims.

The district court also relied upon Duguid v. Best, 291 F.2d 235 (9th Cir. 1961), cert. denied, 372 U.S. 906 (1963), in reaching its conclusion. In view of the foregoing, we cannot take cognizance of the issue of discovery in the case at bar -- it may be raised in an appropriate contest proceeding.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Frederick Fishman
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge